Petition

81-1549

No.:_____

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IN THE

Supreme Court of the United States

October Term, 1981

RICHARD MASTRANGELO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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February 18, 1982

Question Presented

Whether the double jeopardy clause and the due process clause permit a second trial of the petitioner when the first trial was ended by the declaration of a mistrial resting on the finding of a "distinct possibility" that the petitioner was implicated in causing the death of a government witness although the record did not establish the fact by a preponderance of the evidence and no hearing was held on the question.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Richard Mastrangelo respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit affirming the denial by the United States District Court for the Eastern District of New York of petitioner's motion to dismiss the indictment against him on double jeopardy grounds.

Opinions Below

The opinions of the Court of Appeals, reported at 662 F.2d 946, appear in the Appendix hereto at pp. 1a-20a. No opinion was rendered by the District Court for the Eastern District of New York.

Jurisdiction

The date of the judgment of the United States Court of Appeals for the Second Circuit was October 28, 1981. On November 10, 1981, Mastrangelo filed a timely petition for rehearing by the Court of Appeals in banc which was denied on December 21, 1981. Appendix 21a-22a. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

Constitutional Provisions Involved in the Case

United States Constitution, Amendment V:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb ... nor be deprived of life, liberty or property, without due process of law ....

Statement of the Case

The petitioner and fourteen co-defendants were charged in the Eastern District of New York with conspiring to violate federal narcotics laws. Mastrangelo was also charged with importation and possession with intent to distribute of large quantities of marijuana and methaqualone. The prosecution arose out of the seizure of large amounts of marijuana and methaqualone at a marina in Queens, New York City, where it was being unloaded from a fishing trawler.

The government's case against Mastrangelo consisted largely of the testimony (given before the grand jury) of a witness, Bennett, who said that he had sold to the petitioner the trucks that were used to receive the offloaded drugs. Mastrangelo was also charged with a count of obstruction of justice based on the tape recording of a conversation between him and Bennett in which, according to the government's characterization, Mastrangelo had warned Bennett not to testify against him before the grand jury. The language on the tape recording is equivocal and does not obviously amount to a threat.

Mastrangelo and co-defendant Joseph Dazzo were severed from the other defendants because of the unavailability of their counsel. In addition, the obstruction of justice count against Mastrangelo was severed on the ground that the admission of the tape-recording evidence relating to it would be unreasonably prejudicial to his co-defendant, Dazzo.

The trial of Mastrangelo and Dazzo on the drug counts began on April 27, 1981. On the third day of the trial, when the evidence against Dazzo had been largely presented, Bennett, the principal witness against the petitioner, was murdered on the streets of Brooklyn. After a colloquy which is discussed in the opinion of the Court of Appeals, Appendix pp. 7a-8a, the court declared a mistrial as to Mastrangelo and revoked his bail.

The petitioner later filed a motion for a dismissal of the drug counts on double jeopardy grounds. The motion was denied after argument. This denial was appealed to the Court of Appeals for the Second Circuit who affirmed by a divided panel. A motion for rehearing also having been denied, the government now proposes to proceed with a second trial of the petitioner.

Reasons for Granting the Writ

This case presents the most compelling reasons for granting the writ. The opinion and judgment of the majority in the Court of Appeals propounds the extraordinary and deeply subverting doctrine that the constitutional right of a defendant not to be put twice in jeopardy may be ignored when there is a reasonable finding of a "distinct possibility" that circumstances might exist which, if present, would justify the displacement of the right. Appendix pp. 12a-13a. Furthermore the Court of Appeals held that this "distinct possibility" need not emerge from any adversarial hearing on the facts in issue but could simply be so characterized in the discretion of the trial court exercised in a virtually *ex parte* manner. Appendix pp. 14a-15a. The decision of the Court of Appeals is thus not only a deep erosion of the double jeopardy guarantee but has infinitely wider reverberations, amounting to a pervasive threat to the constitutional rights of defendants in numerous situations.

I

The Decision Below Interprets the Concept of Manifest Necessity in a Manner Hostile to the Decisions of This Court and Incompatible with the Double Jeopardy Clause and the Due Process Clause.

When the trial court was first confronted with the dilemma presented by the killing of the witness Bennett, the government moved to introduce the tape recording of the petitioner's conversation with Bennett. But the court responded that this would require a severance which would cause a double jeopardy problem. The court then inquired of counsel for the petitioner whether he wanted a mistrial and ordered a brief recess so that all parties might reflect on the situation.

After the recess Mastrangelo's counsel stated emphatically that he did not want a mistrial and that an earlier motion he had made for a mistrial (on the preceding day and relating to a quite different matter) had in his view lapsed because of curative instructions given to the jury by the court. The government then urged the court to view the posture of the case as involving manifest necessity, since, as they argued, they needed to put the tape recording in evidence and could not do this without prejudice to the co-defendant.

The judge then stated that he was going to grant Mastrangelo's earlier motion for a mistrial which the court viewed as being still before it. (This strained view of the earlier motion was properly repudiated by the Court of Appeals who were unanimous that this could not be a proper ground for the decision since the earlier motion had clearly lapsed. Appendix p.9a). The trial court added cryptically, "If that motion had not been made by the defendant I would have granted it on my own motion in view of these circumstances."

This last allusion was elaborated when argument was had at a later date on the petitioner's motion to dismiss the indictment on double jeopardy grounds. During this colloquy the court claimed that he had granted the "motion" for manifest necessity on the grounds that (a) there was no other practical remedy, and (b) that the court had been persuaded by a preponderance of the evidence that the petitioner was in some sense a participant in the killing of Bennett. The judge claimed to have made this determination on the basis of the following "facts." 1. Mastrangelo was the only person who obviously could gain from the killing. 2. The tape recording indicated that

Mastrangelo had earlier warned Bennett not to testify.* 3. Mastrangelo did not appear shocked when the killing was announced in the courtroom.

The notion that this could in any sense be regarded as a "finding" based on any standard of proof is hard to accept since there had been no adversary hearing of any kind, indeed no evidence at all of Bennett's death other than a little speech from the prosecutor, and since the items listed are so frail and equivocal. Perhaps taking this point, the Court of Appeals did not rely upon the "proof by a preponderance" standard but, instead, with one member of the panel dissenting strongly, held that manifest necessity may rest on a reasonable finding by the trial court of a "distinct possibility" that justifying circumstances exist and that, though a hearing is generally to be preferred when possible, the constraints of time made it impossible in this case. Appendix p. 12a.

The Opinions in the Court of Appeals

If the reasoning of the trial court, as the Court of Appeals seemed implicitly to find, was lame and unconvincing, the reasoning of the Court of Appeals is ominous and fraught with grave danger to constitutional protections. For the trial court at least purported to be acting on a rational standard, though its procedures were gravely defective and its findings indefensible. But the Court of Appeals, unable to defend the findings of the trial court in the light of a proper

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* The trial court, as quoted by the Court of Appeals, Appendix p.10a, speaks of evidence of threats to "other witnesses." This appears to be an error since there was no such evidence. The taped conversation leaves it disputable as to whether even Bennett was threatened by the petitioner.

standard, has chosen to substitute a standard that is astonishingly destructive in its normative implications. Even the government in its brief had argued before the Court of Appeals for the acceptance of proof by a preponderance as the proper standard in this situation. But the "distinct possibility" test seems to have been devised by the Court of Appeals to rescue the government from its commitment to a standard that patently was not satisfied on the record. The rescue process does grave damage to precedent and the Constitution for the following reasons.

1. A "distinct possibility" hardly seems a standard at all. Obviously there may be a "distinct possibility" that something is so and at the same time a "distinct possibility" that it is not so. Indeed, one could be persuaded by a preponderance of the evidence that something is *not* so and yet recognize a "distinct possibility" that it may be so. It is unacceptable that a deprivation of the defendant's double jeopardy rights should rest on such a conclusion, for it virtually amounts to letting the vindication of the right depend upon the unreviewable whim of the trial judge.

2. The elimination of even the sketchiest adversary proceeding is deeply hostile to our traditions and a denial of due process. In this case the trial court not only did not hold any kind of a hearing but did not even receive evidence as to the manner of Bennett's death, relying instead on an emotional little speech from the prosecutor. While it may be difficult to hold a hearing on such an event that could explore it with any depth in the short time that a continuance of the trial could afford, there can be no doubt that a continuance of a day or so could have led to the orderly and regulated introduction of *some* evidence as to the death of the witness and afforded the defendant *some* opportunity to make a case, if he wished to do so. The court's rush to judgment deprived the defendant of his constitutional right without even such a minimal inquiry. This should not have been countenanced by the Court of Appeals.

3. Statements about the trial court's discretion in such circumstances hardly cure the vices of the procedure. As the dissent of Meskill J. in the Court of Appeals reminds us this Court has said that "the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one." *Arizona v. Washington*, 434 U.S. 497, 505 (1978). The notion that some deference be paid to the exercise of discretion cannot be stretched to abdicate the power of review in the face of arbitrary action.

4. Finally, the enormity of the holding in this case may be illustrated by the projection of its principles into other situations. Under the Court of Appeals' ruling, a judge might admit a confession into evidence, although its voluntariness had been challenged, just because he perceived a "distinct possibility" that it might be voluntary. Suppose a bench trial were held in the absence of any expression by the defendant of his waiver of a jury trial. To uphold this procedure, would it be enough for a judge after the event to declare that he thought it distinctly possible that the defendant did not want a jury trial? Suppose a challenge is made to the prosecution of a witness who received immunity before the grand jury, would it be sufficient for the court to hold that the prosecution might proceed since there was a "distinct possibility" that the evidence to be used might not be tainted?

These examples suggest the only possible answer. But if we add to them the circumstance that in any of these cases the judge arrived at the finding without any hearing and, indeed, only articulated his reasons at a later proceeding when adversary joinder was impossible, the situation would become doubly intolerable. The holding of the Court of Appeals in the instant case could only be upheld if there were something radically different about the defendant's double jeopardy right from the examples just given.

It is submitted that there is nothing significantly different. The right not to be put twice in jeopardy is as fundamental as the right to be tried by a jury or not to be compelled to be a witness against oneself or not to have a coerced confession introduced in evidence. As to a confession, there is no presumption of coercion and the defendant may be properly required to make the first showing by raising some colorable possibility of coercion. Then the burden is on the government to show voluntariness by a preponderance. *Lego v. Twomey*, 404 U.S. 477 (1972). As to a jury trial, there is a duty on the court to secure a recordation of a waiver. F.R.Crim.P.23(a). *Singer v. United States*, 380 U.S. 24 (1965). As to prosecution after the appearance of the defendant as a grand jury witness, the prosecutor carries a heavy burden to show the absence of taint. *Kastigar v. United States*, 406 U.S. 441 (1972).

Here it is clear that to try the petitioner a second time appears prima facie to be a violation of his double jeopardy rights. Manifest necessity is not to be presumed but is a special justification for such a procedure, the burden of establishing which falls on the government when the mistrial declaration comes up for review. To require only that the government point to a distinct possibility makes a mockery of the proposition that it is under any burden. This amounts to no burden at all and, in the present case, the proceedings are further vitiated by the denial to the petitioner of any opportunity to make a showing to the contrary. In this regard it is significant that the petitioner has never been charged with any involvement in the death of Bennett.

Alternative Measures

Even if some proper standard of proof had been enunciated, there could not have been any proper finding of manifest necessity in this case. This Court said in *United States v. Jorn*, 400 U.S. 470, 485 (1971) that a *sua sponte* declaration of a mistrial should not be made "until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings."

But more than one practical possibility existed here that would have preserved for the petitioner his constitutional right to get to his jury. First, the trial could have been allowed to proceed without the introduction of the tape. The government had some evidence against Mastrangelo and could have been left to take their chance with what they had. Or, as the Court of Appeals suggested, Appendix p. 14a, a redaction of the transcript and the tape might have been made to remove any objectionable features. These possibilities were not adequately considered and were improperly rejected. The deference that may be due to a trial court's assessment of the situation hardly covers a case such as this when no real inquiry was made into the possibility of alternatives.

The Purpose of the Declaration

The purpose of the declaration of a mistrial is also a vital question. Here there was no question of the declaration benefitting the petitioner. It was clearly designed (a) to allow the trial of the co-defendant to go forward without possible prejudice and (b) to allow the government a respite to gather or present other evidence against the petitioner. But this Court has said that "the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence." *Arizona v. Washington*, 434 U.S. 497,

508 (1978). This was not a case like *Illinois v. Somerville*, 410 U.S. 458, 469 (1973) where a continuation of the trial could not possibly have resulted in a sustainable conviction. In *Somerville* the proceedings were regarded as a nullity under local law. But in the present case the proceedings were perfectly valid and the mistrial had no purpose but to allow the government to regroup and reinforce its evidence.

This may be demonstrated by considering the hypothesis that the witness Bennett had died of natural causes. It seems clear beyond doubt that the government could not then have secured a mistrial in order to accumulate other evidence or to introduce evidence that they had agreed pre-trial would not be admitted. Thus if the mistrial could conceivably be justified in this case it would only be because there had been a showing by some acceptable standard of proof that the defendant had waived his double jeopardy claims by participating in the killing of Bennett and in this way wilfully deprived the government of their evidence. We have seen that such an acceptable standard was abandoned by the Court of Appeals. But it is important also to observe that on the record in this case such a proper standard of proof was unattainable.

The Basis for the Finding

An examination of the three items of "evidence" that the trial court asserted led to its finding will show the terrible dangers of the procedure followed. The tape recording of the conversation between the petitioner and Bennett was never played or put in the record and the defendant of course never had any opportunity to challenge it or explain it, since the court never disclosed at the relevant time that his ruling would be based on a finding of the defendant's participation in Bennett's murder. This rationalization was only offered at a later date on the motion to dismiss the indictment.

The second item was the court's assertion that nobody else had any reason to kill Bennett. But when the court made the mistrial declaration there was no evidence at all of how Bennett had been killed. A statement by the prosecutor was all the court had heard of the matter before it jumped to its instant ruling. How did the trial court know, and how could the Court of Appeals know whether anyone else had any reason to kill Bennett? The record does not disclose the detailed circumstances of his murder. Indeed, the record does not contain *any evidence* of his murder. Hearings, evidence and orderly adversary procedures were replaced by a speech from the prosecution followed by the court's ruling.

The third piece of "evidence" was the defendant's failure to exhibit shock at the news of the murder. On reflection this should surely not be taken seriously. We know that people have an enormous spectrum of reaction to news. The defendant was hardly likely to appear grief-stricken when the chief witness against him was killed. Suppose he had broken out with a burst of glee? Would this be evidence that he killed Bennett?

Indeed it can very plausibly be argued that Bennett's murder did the petitioner great harm. His bail was instantly revoked and he has been incarcerated ever since. If a second trial proceeds on the drug counts he may well be convicted and his sentence would likely be much greater than if the death of Bennet had not occurred. Even if a second trial is not permitted on the drug counts he still faces trial for obstruction of justice when, if convicted, he will likely get a severe sentence. At a colloquy with counsel during the argument on the motion to dismiss, this point was made to the trial judge who agreed that it had much merit. Thus it is not at all obvious that the petitioner had so much to gain from Bennett's death that he is the most likely suspect.

These points demonstrate overwhelmingly why in such cases it should be presumptively mandatory to hold a hearing. It hardly matters whether any of the items the trial court listed can be considered as evidence that Bennett was killed by the defendant; it hardly matters whether we say the burden on this question was that of a reasonable doubt or that of a preponderance; for what do burdens and evidence count for, when there was no hearing? In effect in this case the trial court made a private decision on the *ex parte* application of the prosecutor and that is enough to condemn the outcome.

This analysis illuminates the reasons why the Court of Appeals resorted to the fashioning of its strange, new creature — the "distinct possibility" formula. Indefensible under a rational application of the preponderance criterion, the trial court's action could only be rescued by propounding this non-standard. But the price is too high and all the principles of a constitutional criminal procedure call for its repudiation. It is no more than a thin disguise for a denial of the very substance of the petitioner's double jeopardy rights.

Conclusion

For these reasons a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

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February 18, 1982

Appendix

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 257—August Term, 1981

(Argued: September 17, 1981 Decided: October 28, 1981)

Docket No. 81-1270

UNITED STATES OF AMERICA,

Appellee,

-against-

RICHARD MASTRANGELO,

Appellant.

Before:

OAKES and MESKILL, *Circuit Judges*, and
BLUMENFELD, *District Judge.**

Appeal from a judgment of the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Chief Judge*, denying appellant's motion to dismiss three counts of an indictment on the ground of double jeopardy. The court had declared a mistrial and severed the trial of appellant and a codefendant when it learned that the sole witness about to testify against the appellant had been murdered and determined that substitute evidence against the appellant would unfairly prejudice the codefendant. Held that appellant had withdrawn his previous motion for a mistrial but that the mistrial was properly declared on the basis of manifest necessity and that the double jeopardy clause therefore does not bar appellant's retrial.

Affirmed.

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* Of the District of Connecticut, sitting by designation.

Appendix A
Opinion of United States Court of Appeals

GERALD SHARGEL, New York, New York (Graham Hughes, of counsel), *for Appellant.*

SUSAN E. SHEPARD, Assistant United States Attorney (Edward R. Korman, United States Attorney for the Eastern District of New York, Vivian Shevitz, Assistant United States Attorney, of counsel), *for Appellee.*

OAKES, *Circuit Judge*:

This expedited appeal raises anew the question whether there was "manifest necessity," *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824), for the declaration of a mistrial. What makes this case unique is that the mistrial was declared following the killing of the Government's only witness against appellant, Richard Mastrangelo. The killing occurred on the witness's way to the courtroom to testify in a trial in which the Government's case against the codefendant, Joseph Dazzo, was essentially complete. The United States District Court for the Eastern District of New York, Jack B. Weinstein, Chief Judge, denied appellant's motion to dismiss Counts 1, 4, and 5 of the indictment on the ground of double jeopardy. We hold first that appellant had for all practical purposes withdrawn his previous motion for a mistrial on other grounds, so that *United States v. Dinitz*, 424 U.S. 600, 611 (1976), does not apply and we must examine the declaration of the mistrial under the manifest-necessity standard. We hold second, however, that the court's ordering a mistrial after the witness's murder was proper under that standard, and we accordingly affirm.

Appendix A
Opinion of United States Court of Appeals

FACTS

Appellant Mastrangelo and his codefendant Joseph Dazzo were charged in a superseding indictment, along with three others who were severed before trial, with conspiracy to import and to possess with intent to distribute substantial quantities of marijuana, 21 U.S.C. § 846(1) (Count 1), possession with intent to distribute of approximately 23.4 tons of marijuana (a Schedule I controlled substance) and 499,000 Methaqualone tablets (a Schedule II controlled substance), 21 U.S.C. § 841(a)(1), 18 U.S.C. § 2 (Count 4), and intentional importation into the United States at Yancarib Enterprises in Queens, New York, aboard the vessel *Terry's Dream*, of the same amounts of marijuana and Methaqualone, 21 U.S.C. §§ 952(a), 960, 18 U.S.C. § 2 (Count 5). Count 6, which was severed before the Mastrangelo-Dazzo trial, charged Mastrangelo with knowingly and corruptly endeavoring to influence the due administration of justice, 18 U.S.C. § 1503.[1]

The Government's evidence at the trial before Judge Weinstein that commenced on April 27, 1981, established the existence of a conspiracy to import boatloads of marijuana into New York from Columbia, South America, between November 10, 1977, and November 11, 1978. On the latter date law enforcement officers in Queens interrupted the offloading of a 75-foot shrimp boat known as *Terry's Dream*, which members of the conspiracy had purchased in Florida in November 1977, and used several times for marijuana importation. At the Yancarib Marina in Queens the officers seized the shrimp boat, a tugboat called the *Bill Mather*, four trucks, three vans, and a Buick sedan. The vessels and

[1] Judge Weinstein has ordered the obstruction-of-justice count rejoined for the retrial of appellant. Counts 2 and 3 of the indictment name neither Dazzo nor Mastrangelo and are thus not at issue here.

vehicles contained a total of 23.4 tons of marijuana and 499,000 Mathaqualone tablets. The persons offloading the boat escaped.

At trial, four witnesses connected codefendant Joseph Dazzo to the purchase and repair of the tugboat used to bring the *Terry's Dream* into New York harbor. Frederick Ardolino identified Dazzo as one person who was with him in Virginia to purchase the *Bill Mather* in February 1978. Alfred Jensen, the agent for the seller of the *Bill Mather*, corroborated Ardolino's testimony. James Muller and Kathleen Muller, employees at a family-owned boatyard in Brooklyn, testified about repair work on the *Bill Mather* in April 1978, identifying Dazzo as the person who used the alias "John Ward, Jr.," and directed the repair work.

Important to the sequence of events and to the judge's later ruling on the mistrial was the cross-examination of Ms. Muller on April 29. Dazzo's attorney inquired about a statement she had made to one Haggerty, an investigator employed by Dazzo who had shown her some pictures of people. Asked if she had recognized any of the people, she replied that one of the pictures looked like the person who had identified himself as John Ward. The following colloquy then occurred:

> Q. But you did—Did you also tell Mr. Haggerty that you were not sure—
>
> A. I had reasons, what I said to Mr. Haggerty, when he was in my office.

On redirect, the Government asked Ms. Muller to explain the circumstances of her conversation with Haggerty. After she explained that Haggerty had said he was an investigator for Dazzo's attorney, the Government asked her the following question:

> Q. You recall on cross-examination you started to say you had reasons for telling Mr. Haggerty what you told him. What were those reasons?

To this, Mastrangelo's counsel, Mr. Coiro, objected, seeking a sidebar conference. The court excused the jury, questioned the witness, and then announced that it would issue the following curative instruction:

> You can say—we can stipulate that she would have answered in words or substance that she did not feel under the circumstances that she wanted to be fully candid with Mr. Haggerty.

Although the Government and Dazzo's attorney agreed to the curative instruction, appellant's counsel, alleging that the questioning implied that the witness had been threatened, moved for a mistrial. Judge Weinstein denied this motion and, after giving the instruction to the jury, again inquired whether it was satisfactory. Counsel for the Government and Dazzo stated that it was, but Mr. Coiro, for Mastrangelo, had no comment.

By the afternoon of April 29, the third day of trial, the case against Dazzo had been substantially completed, and the Government was ready to begin its case against Mastrangelo. The Government originally had hoped to introduce a tape recording made on February 1, 1979, of a conversation between James Bennett and Richard Mastrangelo. Bennett had consented to the taping; this conversation was the subject of the severed sixth count of the indictment for obstruction of justice. The court had, however, in a pretrial ruling, excluded the tape as prejudicial to Dazzo under *Bruton v. United States*, 391 U.S. 123 (1968), and its progeny. James Bennett, who was not implicated in the conspiracy, had worked with his brother at Smitty's Auto & Truck Sales in Brooklyn and had evidently sold to Mastrangelo

some of the trucks that were among the vehicles seized at the Yancarib Marina. In its opening the Government had stated that Mastrangelo had purchased three large moving trucks from Smitty's Auto & Truck Sales in February 1978, paying in cash, and that two of those trucks were seized at the Yancarib Marina, one loaded with marijuana. The Government stated that in September 1978 Mastrangelo paid cash for two more trucks, which were put in the name of Allrite Trucking, a corporation formed by "the organization," and that both of the later-purchased trucks were seized at the Yancarib Marina loaded with marijuana. In the excluded tape-recorded conversation, Mastrangelo, after learning of Bennett's subpoena by a grand jury, tells Bennett to say "[n]othing" in front of the grand jury and "if they ask, in other words, uh, if they say anything with me, you can't say me. Do you understand?" Bennett, apparently not getting the message, replies, "Well, I say, uh, I say I sold you the trucks, right?" And Mastrangelo says, "You can't.... You can't say that. Because you didn't sell me the trucks." When Bennett says, "Well, I actually sold you the trucks," Mastrangelo tells him, "You didn't. You know, Jim? You know what I mean you really didn't?" He adds, in what could well be interpreted as a threat, "You know what I mean Jim it's for your own good 'cause' then ah, in other words they're going fuck everything around. I'll get back to you as far as anything...." Later in the conversation, Mastrangelo tells Bennett, "If they show you a picture of anybody, that's not him, that's not him. In other words, they can show you a picture of a million guys, that's not him. That's it. You know what I mean Jim? And that's all you got to say." When Bennett protests, "Well I have to say I sold the trucks"—the Government has seen his book showing the sale of the trucks—Mastrangelo replies, "Don't do that because you know why Jimmy? I could turn around

and say no he didn't. There's nothing on paper." Mastrangelo continues, in possibly threatening language, "You know. So let's do it the right way....This way. Cause they're busting your balls. You got your fucking book. There's my fucking book. What do you want?" Bennett says, "Yeah," and Mastrangelo says, "You know what I mean Jim?" Bennett says, "Uh huh," and Mastrangelo says, "And that's it, case closed."

The court having excluded this evidence because it was prejudicial to Dazzo—evidence that not only incriminated Mastrangelo directly but would be powerful evidence of his consciousness of guilt—it became essential for the Government to call James Bennett himself for proof of the truck transaction. According to the Government's uncontested representation to the trial court, Bennett flew into New York from Florida, where he was living semi-retired, the day before he was to testify. He was at the United States Attorney's office until 10:00 p.m. and was then driven to his daughter's home in Brooklyn. Again according to the Government's uncontested representation, Bennett, on his way to the courthouse on April 29, 1981, "left his daughter's home chased by two men, and [was] shot dead on the street."

Upon so informing the court, the Government first renewed its application to use the tape but the court said, "All I can do is sever Mr. Dazzo and Mr. Mastrangelo and start all over again." The court, aware of the double jeopardy problem, asked counsel for Mastrangelo "whether you make a motion for a mistrial, and renew your motion for a severance?" Counsel asked for time to consider that. A second application by the Government was that Mastrangelo's bail be increased to $500,000. The court said that as to Dazzo it saw no reason why "we could not go ahead," but revoked Mastrangelo's bail and then called in the marshals to arrest Mastrangelo and take him into custody. The court made arrange-

ments to sequester the jury and ordered jurors not to communicate with anyone. Additionally, the court asked the Government to arrange to have protective custody for the Mullers, who testified earlier that day.

At this point the court informed Mastrangelo's counsel that "[y]ou have already moved for a mistrial and I am considering the granting of that motion. That has not been withdrawn....I denied the motion [earlier], but I am reconsidering it and I am reserving decision." Judge Weinstein again noted his unwillingness to rejoin the obstruction count or play the tape, for fear of tainting the jury in connection with the "clean case against Dazzo." Further discussion indicated that the case against Dazzo would be closed with a few formalities. The court gave Mastrangelo's counsel more time to make known his position, and after consultation counsel stated on the record that "the defendant Mastrangelo's position is that we are not moving for a mistrial.... At the present time ... there is no motion on behalf of the defendant Mastrangelo before the Court at this time." The court, however, then granted the defendant Mastrangelo's previous motion for a mistrial and severance (based on Ms. Muller's testimony), but added that "[i]f that motion had not been made by the defendant, I would have granted it on my own motion in view of these circumstances. If I had not granted it on my own motion, I would have granted it on the government's motion." Mastrangelo's counsel stated for the record that "at this time I am not renewing that motion [for a mistrial]." The judge ordered that the portion of the transcript containing a reference to the Mullers' address be sealed, and the trial against Dazzo proceeded, culminating in his conviction.

DISCUSSION

The Goverenment argues that Mastrangelo did not withdraw his motion for a mistrial before it was granted and that accordingly under *United States v. Dinitz*, 424 U.S. 600, 611 (1976), any claim of double jeopardy is unavailable. We agree with appellant, however, that for all practical purposes, though not in so many words, the motion for a mistrial based upon Ms. Muller's testimony was withdrawn. Before the court granted the motion, defense counsel stated on the record, "After consultation, Judge, the defendant Mastrangelo's position is that we are not moving for a mistrial ... At the present time, in light of the unfortunate situation that has happened, there is no motion on behalf of the defendant Mastrangelo before the Court at this time." This case is similar to *United States v. Evers*, 569 F.2d 876, 878 (5th Cir. 1978), in which defense counsel had moved for a mistrial but then "advised the court that because defendant was anxious not to retry the case, and because he did not think the evidence sufficient for the case to go to the jury, he would withdraw his motion for a mistrial." This in effect was what defense counsel did here, and therefore the question must turn on "manifest necessity."

In this connection the arguments below on Mastrangelo's double-jeopardy motion shed further light on the trial court's decision, though we realize that under *Arizona v. Washington*, 434 U.S. 497, 516-17 (1978), the record speaks for itself in connection with manifest necessity and the trial court's mistrial ruling is entitled to great deference irrespective of any statement of reasons by the trial court. *See United States v. Grasso*, 600 F.2d 342, 343 (2d Cir. 1979) (recognizing that the court's previous holding in *United States v. Grasso*, 552 F.2d 46 (2d Cir. 1977), that findings by the trial court were necessary had been "plainly overruled by the Supreme Court" in *Arizona v. Washington*).

Appendix A
Opinion of United States Court of Appeals

The arguments below on the motion now appealed from demonstrate that the district court's underlying reason for declaring a mistrial was that the judge quite understandably believed that Mastrangelo was responsible for Bennett's death. That the court, immediately after being informed of Bennett's death, (a) sequestered the jury, (b) revoked Mastrangelo's bail, (c) ordered protective custody for the Mullers, and (d) sealed the portion of the transcript containing the Mullers' address, confirms this, though it was not made explicit at that time. As the court below stated at argument,

> I was under the distinct impression, and I believe that by a preponderance of the evidence, based on what I then had before me, I was warranted in finding that this defendant, Mastrangelo, either directly arranged for the killing of the witness or was advised of the possible killing of the witness and acquiesced. He was the only person that could gain from it.
>
> Dazzo couldn't gain from it at all. He was, by that time, destroyed by the government's case....
>
> There was evidence before the Court that this very defendant, Mastrangelo, had threatened other witnesses, in fact, he had been indicted and I severed that count.
>
> The tape was clear that he had threatened another witness. Mastrangelo was out on bail. The Court observed him during this emergency. Everybody in this courtroom was shocked. Mr. Coiro was very upset. The defendant, Mastrangelo, took it like a soldier. He didn't smile, as I recall, but he certainly wasn't upset by it. At best, he was neutral on the issue.
>
> It just is inconceivable ... that this radical step to aid Mastrangelo, who is the only person that could have been helped by killing this witness,

> would have been taken without his knowledge, acquiescence, or orders. And that, it seems to me, is the clearest situation of a finding of manifest necessity that you can get.

Appellant agrees, as he must, that if he had in fact killed or arranged for the killing of the witness Bennett, the court could make a finding of manifest necessity for the declaration of a mistrial.[2] He argues, however,

---

[2] The defendant's responsibility for reviving the *Bruton* problem would clearly distinguish the case from *United States v. Glover*, 506 F.2d 291 (2d Cir. 1974). In *Glover* the prosecution waited until the fifth day of a joint trial to notify the court that it intended to introduce statements by Glover that presented a *Bruton* problem with respect to the other defendants. The trial court granted the Government's motion for a mistrial and severance as to Glover and we held that he could not be retried. Insofar as the mistrial was granted for the benefit of the codefendants and the Government, and "Glover had done nothing to bring about the *contretemps* that resulted in the declaration of a mistrial," 506 F.2d at 297-98, there was not a manifest necessity for ordering the mistrial. If the defendant creates the need for the mistrial and severance, as by killing a witness and necessitating the use of substitute evidence that is inadmissible in a joint trial, *Glover* does not bar his retrial.

Apart from appellant's possible involvement in the murder, this case differs from *Glover* in that the prosecution in *Glover* failed to seek a pretrial ruling on the *Bruton* evidence, whereas here the prosecution sought such a ruling and was willing to forego the use of the tape in the joint trial because it assumed Bennett would testify. We need express no opinion on whether the prosecution's freedom from fault, absent reason to suspect the defendant was responsible for the witness's unavailability, would alone suffice to make *Glover* inapplicable and sustain a finding of manifest necessity for a mistrial and severance. *Dunkerley v. Hogan*, 579 F.2d 141 (2d Cir. 1978), we find distinguishable because there acontinuance was a viable alternative. Here the only "viable alternative" suggested was a reversal of the trial court's ruling excluding the Bennett-Mastrangelo tape-recorded conversation, coupled with a redaction of the threats in that conversation. We do not believe that to be as "feasible and practical [a] solution to the problem," *id.* at 147, as was the alternative of a continuance in *Dunkerley*. *See* text, *infra*.

that because there was no hearing on this question, no evidence presented other than the Government's representation about what had occurred, and the possibility that Bennett might have been killed by others for other reasons, the court could not assume that appellant was responsible. The purport of this argument is that without an actual showing of the defendant's complicity in the death of the witness, the court could not make a finding of manifest necessity.

We disagree. It would ordinarily be impossible to make an investigation, have a hearing, and permit the introduction of evidence and cross-examination, with some resultant finding based upon whatever standard of proof might be appropriate, *see, e.g., Lego v. Twomey*, 404 U.S. 477 (1972) (upholding the use of the preponderance-of-evidence standard as the burden of proof in a suppression hearing re the voluntariness of a confession), meanwhile suspending the trial in question. It is simply impracticable in the situation of the killing of a key witness to reach any well-founded determination about the true course of events in an hour, a day, a week, or even a month.

The test, therefore, is not whether the defendant was in fact involved in the witness's death, nor even whether under a preponderance of the evidence or some lesser evidentiary standard the court finds it probable that the defendant has participated in the murder. To make such a determination would require a delay in the trial of weeks or even months that would itself ultimately require a mistrial: the jurors' minds would no longer be fresh and, even worse, the reasons for the delay might have become evident to one or more of them. Rather, the test must be simply whether at the time the trial judge is faced with the question he reasonably concludes that there is a distinct possibility that the defendant participated in making the witness unavailable, at

least where, as here, the Government is totally without fault and the case cannot proceed and the ends of justice be served by the evidence already introduced or otherwise available to the Government. Although the defendant has an important interest in concluding his or her confrontation with society, *United States v. Jorn*, 400 U.S. 470, 486 (1971), the courts are also charged with protecting "society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws." *Arizona v. Washington*, 434 U.S. at 509. *See Wade v. Hunter*, 336 U.S. 684, 689 (1949) (the court should weigh the defendant's "valued right to have his trial completed by a particular tribunal" against the public's interest in "fair trials designed to end in just judgments"). We must not only give due deference to the trial judge's determination, *see Arizona v. Washington*; *United States v. Grasso*, 600 F.2d at 347, but that determination in favor of the declaration of a mistrial in a case like this—"along the spectrum of trial problems which may warrant a mistrial and which vary in their amenability to appellate scrutiny"—"is entitled to special respect." *Arizona v. Washington*, 434 U.S. at 510.

We note also that the court here carefully explored and rejected alternatives to a mistrial. The most likely alternative was for the court to reverse its prior decision on the admissibility of the tape-recorded conversation and, using a curative instruction, to attempt to avoid unfairly prejudicing the codefendant, Dazzo. It is always difficult, and sometimes impossible, for a court of appeals, reviewing a cold record of printed words, to measure the likely prejudicial effect of a given piece of evidence in a given trial. The district court's evaluation of events occurring before the jury is, as we said in *Grasso*, 600 F.2d at 343, "to be accorded the highest deference." *See also Arizona v. Washington*, 434 U.S. at 513-14. As Judge Weinstein observed at the hearing on

the double-jeopardy motion below, the court of appeals did not feel "the atmosphere of this courtroom when the jury was dismissed and that the witnesses were obviously under great tension. [It] didn't see the hesitation of these witnesses as they testified." Nor could we observe the effect upon the jury of Ms. Muller's testimony, in response to questioning by Dazzo's attorney, that she "had reasons, what I said to Mr. Haggerty, when he was in my office." We do know that when the Government on redirect asked what those reasons were, Mastrangelo's counsel not only objected but requested a mistrial; the court was very careful to exclude those statements and seek to have the parties stipulate what her answer would have been, namely, that "she did not feel under the circumstances that she wanted to be fully candid with Mr. Haggerty."

Had we been presented with this situation, we might, instead of declaring a mistrial, have reversed our decision not to admit into evidence the taped conversation bearing Mastrangelo's incriminating statements, which after all did not mention Dazzo. But the tape did contain what could be interpreted as a direct threat and, perhaps, a veiled threat against a witness who would not testify. Moreover, with the Government's case against Dazzo essentially completed—a case the judge thought was a "clean" one—we think the judge could properly take into account the public's interest in ensuring that there was neither a mistrial as to Dazzo nor grounds for a retrial at which witnesses who had testified might not be available or willing to testify against him. Acting in an emergency with the Government free from fault, with a distinct possibility that the defendant Mastrangelo was responsible for the killing of the one witness against him, and duly concerned by the threat of prejudice to the codefendant Dazzo (and, indirectly, to the Government's case against Dazzo) from the admission of the tape with a resultant

possible mistrial or new trial as to him, we think the trial judge acted well within the wide discretion afforded him by the double jeopardy cases. We accordingly defer to his judgment about the events occurring before the jury and to his observation of the witnesses, the parties, and the jury itself. To hold otherwise would invade the province of the trial judge for the sake of abstract formality.

Judgment affirmed.

MESKILL, *Circuit Judge* (dissenting):

The majority reduces the Double Jeopardy Clause of the Fifth Amendment to an "abstract formality" that must yield when a trial judge "reasonably concludes that there is a distinct possibility" that a defendant was responsible for the disappearance of government evidence. Because I believe the Double Jeopardy Clause is not so fragile, I dissent.

This is the type of case which evokes the statement "hard cases make bad law." The majority implicitly recognizes that the record cannot support a finding that appellant Mastrangelo was involved in Bennett's killing "under a preponderance of the evidence or some lesser evidentiary standard[,]" but concludes that no such showing is required. The majority cites no authority, and none exists, for its rule that the Double Jeopardy Clause falls to the trial court's reasonable conclusion that there is a distinct possibility that the defendant participated in the disappearance of government evidence. Instead, my brothers rely on statments in *Arizona v. Washington*, 434 U.S. 497 (1978), and *United States v. Grasso*, 600 F.2d 342 (2d Cir. 1979), to the effect that an appellate court must accord substantial deference to a trial court's judgment on manifest necessity. I accept these statements but not the conclusion that they support an affirmance here.

I fully agree that "[a] great deal of discretion must ... be vested in the trial judge, who is usually best situated to determine the degree of necessity for the declaration of a mistrial when an unexpected event occurs during a trial." *Dunkerley v. Hogan*, 579 F.2d 141, 145 (2d Cir. 1978). "This, however, does not end the inquiry .... We must satisfy ourselves that the trial court exercised 'sound discretion.' " *United States v. Grasso*, 600 F.2d at 344 (quoting *Arizona v. Washington*, 434 U.S. at 514). *See also Dunkerley v. Hogan*, 579 F.2d at 145-48 (holding that the trial judge did not exercise "sound discretion"). *Arizona* taught us that the "strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence...." 434 U.S. at 508. Moreover,

> in view of the importance of the [defendant's right to have the trial concluded by a particular tribunal], and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate "manifest necessity" for any mistrial declared over the objection of the defendant.
>
> The words "manifest necessity" appropriately characterize the magnitude of the prosecutor's burden ... Nevertheless, those words do not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge. Indeed, it is manifest that the key word "necessity" cannot be interpreted literally; instead, contrary to the teaching of Webster, we assume that there are degrees of necessity and we require a "high degree" before concluding that a mistrial is appropriate.

Id. at 505-06 (footnotes omitted).

The majority, in permitting the protections of the Fifth Amendment to be defeated by a reasonable conclusion that there is a "distinct possibility" that the defendant was somehow connected with the disappearance of government evidence, ignores the "heavy burden" and "high degree" standards enunciated in *Arizona*. The crux of the majority opinion is that it would be "impracticable in the situation of the killing of a key witness to reach any well-founded determination about the true course of events...." It may well be impracticable to make such a determination, but I cannot accept the conclusion in this case that impracticability justifies relieving the government of its "heavy burden" to show that the denial of an important constitutional protection is highly necessary.

The majority is properly concerned with "society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws." *Arizona v. Washington*, 434 U.S. at 509. It has long been the rule that the trial court should weigh the defendant's "valued right to have his trial completed by a particular tribunal" against society's interest in "fair trials designed to end in just judgments." *Wade v. Hunter*, 336 U.S. 684, 689 (1949). But in *United States v. Glover*, 506 F.2d 291 (2d Cir. 1974), this Court weighed similar facts and concluded that the Double Jeopardy Clause barred reprosecution. The majority's tortured analysis of the standard of proof for finding that Mastrangelo was involved in the killing of a witness is designed to distinguish this case from *Glover*.

Like the instant case, *Glover* involved the declaration of a mistrial in a multidefendant trial. Glover was tried jointly with three codefendants for conspiracy to violate the federal narcotics laws. After almost five days of trial, the government informed the court that it intended to introduce evidence of admissions by Glover.

The judge immediately recognized that this evidence might not be admissible against Glover's codefendants and asked all parties to brief and argue the issue. After considering the arguments, the judge ruled that *Bruton v. United States*, 391 U.S. 123 (1968), and its progeny prohibited introduction of the proffered evidence against Glover's codefendants. He then granted the government's motion for severance of Glover and declared a mistrial as to Glover.

Glover moved to dismiss the indictment on the ground that a subsequent trial would violate his right to protection against double jeopardy. The trial court denied this motion and Glover was tried and convicted. On appeal, this Court held that Glover's motion to dismiss should have been granted because the declaration of a mistrial as to him was not supported by manifest necessity. "The rationale of *Glover* was that retrial violated the Double Jeopardy Clause because it did not provide the involuntarily severed defendant with any advantage, but merely helped his codefendants and the Government." *United States v. Figueroa*, 618 F.2d 934, 944-45 n.6 (2d Cir. 1980).

It cannot seriously be contended that the declaration of a mistrial in the instant case was for the benefit of Mastrangelo. The government concedes that had the trial continued without introduction of the tape, it would have been unable to present even a *prima facie* case against Mastrangelo. As in *Glover*, the trial court here declared a mistrial to protect a codefendant from prejudice without diminishing the government's chances of obtaining a conviction against the severed defendant. *Glover* controls the instant case and requires reversal of the trial court's finding of manifest necessity.

Had the trial court lacked reasonable alternatives to declaring a mistrial, I would agree that manifest necessity existed and that *Glover* would not control.[1] But this was not the case. The trial court could have reversed its ruling on the admissibility of the taped conversation between Mastrangelo and Bennett, protecting against prejudice to Dazzo either by redacting the allegedly threatening portions of the conversation or by giving a curative instruction to the jury. The majority recognizes this as a reasonable alternative and even suggests that it would have preferred this option. Once again, however, the majority retreats behind the statement that the trial court's decision must be accorded "the highest deference." In doing so, the majority ignores the fact that "the basis for the mistrial [was] the unavailability of critical prosecution evidence...." *Arizona v. Washington*, 434 U.S. at 508.

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[1] In addition to distinguishing *Glover* on the ground that Mastrangelo can be held responsible for Bennett's death, the majority suggests that *Glover* might also be distinguished because the government could easily have avoided the mistrial in that case by acting more carefully. The majority implies that it is an open question whether the absence of prosecutorial misconduct or error will vitiate a double jeopardy claim when a mistrial was declared over the defendant's objection, even when the defendant did not cause the problem that precipitated the mistrial.

In *Dunkerley v. Hogan*, 579 F.2d 141 (2d Cir. 1978), this Court held that the Double Jeopardy Clause barred retrial of a defendant following the declaration of a mistrial prompted by the hospitalization of the defendant with a partially collapsed lung. This Court ruled that the mistrial was not supported by manifest necessity because a continuance could have been granted for the 7 to 10 days during which the defendant was expected to be hospitalized. There was no suggestion that either the defendant or the government was in any way responsible for creating the need for the mistrial.

Therefore, where viable alternatives are available, the absence of prosecutorial misconduct or error should not alone defeat a subsequent double jeopardy claim.

Thus, in evaluating the trial court's exercise of discretion, "the strictest scrutiny is appropriate...." *Id.* The majority's search for reasons to affirm the trial court's ruling is plainly inconsistent with the strict scrutiny that *Arizona* prescribes.

The fact that the case against Dazzo was strong and essentially complete should not diminish Mastrangelo's right to have his trial concluded before his first jury when it is not even arguable that the mistrial was for his benefit and when there is no reasonable basis for concluding that he caused the government's evidence to disappear.

I believe that when viable alternatives to declaring the mistrial are available, and when the mistrial is neither for the defendant's benefit nor demonstrably caused by the defendant, a court should be slow to reject the protections of the Double Jeopardy Clause. This is especially true when the court is confronted with the conflicting interests of codefendants. As Judge Gurfein wrote for this Court in *Glover*:

> a permissive attitude toward mistrials in multiple conspiracy cases could lead to an erosion, bit by bit, of the double jeopardy provision—an undesirable result....

506 F.2d at 298. I believe that the majority opinion is a substantial step in that erosion.

Appendix B

Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Rehearing *in Banc*

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 81-1270

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 21st day of December, one thousand nine hundred and eighty-one.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RICHARD MASTRANGELO,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Richard Mastrangelo,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED, Judge Meskill dissenting.

Appendix B

Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Rehearing in Banc

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ _____

A. Daniel Fusaro
Clerk

by Francis X. Guidhart
Chief Deputy Clerk

Appendix C

Statutory Provisions Involved

TITLE 28, UNITED STATES CODE, § 1254:

Courts of appeals; certiorari, appeal, certified questions

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Opposition

Office-Supreme Court, U.S.
FILED
APR 23 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1549

In the Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD MASTRANGELO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether manifest necessity justified a mistrial declared after the principal witness against petitioner was killed on his way to testify.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1549

RICHARD MASTRANGELO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 662 F. 2d 946.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1981. A petition for rehearing was denied on December 21, 1981. The petition for a writ of certiorari was filed on February 18, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was indicted in the United States District Court for the Eastern District of New York, along with four others, for various drug offenses and for obstruction of

justice.[1] The narcotics charges principally concerned a conspiracy to import marijuana into New York from Colombia. Law enforcement officers had discovered members of the conspiracy unloading marijuana from a boat at a marina in Queens, New York; near the marina they found several vehicles containing large amounts of marijuana and methaqualone (Pet. App. 3a-4a). The obstruction of justice charge was based principally on a tape-recorded conversation between petitioner and James Bennett, who had no connection to the conspiracy but had sold to petitioner several of the vehicles seized near the marina (*id.* at 5a-6a). In the conversation, which was recorded with Bennett's consent, petitioner threatened Bennett and urged him to testify falsely before a grand jury that Bennett had not sold the vehicles to petitioner (*id.* at 6a-7a).

Petitioner was scheduled to be tried with co-defendant Dazzo, who was linked to one of the boats used in the importation (Pet. App. 4a). Before trial, however, District Judge Weinstein ordered the obstruction of justice charge severed and ruled that the tape recording could not be used at the joint trial because it would be unfairly prejudicial to Dazzo (*id.* at 3a, 5a). The government accordingly made plans to have Bennett, who lived in Florida, testify at trial.

On the third day of the trial, a witness whose testimony essentially completed the government's case against Dazzo stated, in response to a question by Dazzo's counsel, that "I had reasons" for not being fully forthcoming during an interview with a private investigator employed by Dazzo

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[1]Specifically, petitioner was charged with conspiracy to import and possess marijuana with intent to distribute, in violation of 21 U.S.C. 846; possession of marijuana and methaqualone with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2; importation of marijuana and methaqualone, in violation of 21 U.S.C. 952(a) and 960 and 18 U.S.C. 2; and endeavoring to influence the due administration of justice, in violation of 18 U.S.C. 1503 (Pet. App. 3a).

(Pet. App. 4a). On redirect examination, the government inquired into these reasons and petitioner's counsel immediately objected. Judge Weinstein excused the jury and offered to give a curative instruction. The government and Dazzo accepted the instruction, but petitioner moved for a mistrial on the ground that the question implied that the witness had been threatened. Judge Weinstein denied the motion and gave the instruction (*id.* at 5a).

Later that day, Bennett, on his way to the courthouse to testify, was chased by two men and shot dead in the street (Pet. App. 7a). Judge Weinstein immediately ordered that the bail of both defendants be revoked, that the jury be sequestered, that the government provide protective custody for certain witnesses who had testified against the defendants earlier in the day, and that the portions of the record containing those witnesses' addresses be sealed (Pet. App. 7a-8a; Tr. 485-486, 502). Judge Weinstein asked petitioner's counsel if he would move for a mistrial; counsel requested, and was granted, time to consider the matter and to consult with associates (Pet. App. 7a; Tr. 484-485).

After consulting, petitioner's counsel suggested that the obstruction of justice count be rejoined, apparently envisioning that the tape recording would be introduced; then, petitioner's counsel said, Dazzo would move for a mistrial (Tr. 488). But Judge Weinstein, confirming with the government that the case against Dazzo was nearly complete, insisted that Dazzo's trial proceed to completion (*ibid.*). The government suggested that the jury be allowed to reach a verdict on Dazzo and that petitioner's trial then resume, with the recording introduced into evidence; but petitioner's counsel rejected this suggestion, and the judge refused to allow it on the ground that the procedure might taint the verdict on Dazzo (*id.* at 489; see *United States* v. *Stratton*, 649 F. 2d 1066, 1083 (5th Cir. 1981)).

After further consultations, petitioner's counsel stated that he did not wish to move for a mistrial and that he withdrew the motion for a mistrial he had made earlier in the day (Tr. 495). Judge Weinstein noted that the government's opening statement had referred to Bennett's expected testimony against petitioner, and that the jury was likely to infer that Bennett "was either influenced not to speak or else was made unavailable" by the defendants (*id.* at 495-498). With Dazzo's assent (*id.* at 500-501), Judge Weinstein then "grant[ed] [petitioner's] motion for a mistrial and severance," stating (*id.* at 501): "If that motion had not been made by the defendant, I would have granted it on my own motion, in view of these circumstances. If I had not granted it on my own motion, I would have granted it on the government's motion."[2]

2. Shortly thereafter, petitioner moved to dismiss the indictment. At the argument on this motion, Judge Weinstein offered petitioner, several times, a "full opportunity to submit evidence" and a "full hearing" (M. 3, 4, 7, 10).[3] Petitioner specifically declined to request a hearing (M. 9-10). Judge Weinstein stated that he had granted the mistrial in part because he had concluded, by a preponderance of the evidence, that petitioner was implicated in Bennett's killing; the judge explained that this conclusion was based principally on the threats petitioner had made against Bennett during the recorded conversation, as well as on petitioner's demeanor when the killing was announced and on the fact that petitioner alone benefitted from the killing (Pet. App. 10a-11a). Judge Weinstein denied the motion to dismiss the indictment, and petitioner appealed.

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[2]Dazzo was subsequently convicted (Pet. App. 8a).

[3]"M." refers to the Minutes of Argument on the Motion to Dismiss, dated June 26, 1981. A copy of these minutes has been lodged with the Court.

The court of appeals affirmed. It ruled that petitioner had effectively withdrawn his motion for a mistrial, but that the mistrial was justified by a "manifest necessity" and therefore did not bar a retrial (Pet. App. 9a). Judge Oakes, writing for the panel majority, stated that the existence of "a distinct possibility that [petitioner] participated in making the witness unavailable" was sufficient to create a manifest necessity for a mistrial, in view of the fact that "the Government [was] totally without fault and the case [could not] proceed and the ends of justice be served by the evidence already introduced or otherwise available to the Government" (*id.* at 12a-13a). The court explained that it was not necessary for the district judge to find that it was more likely than not that petitioner was implicated in the killing (*id.* at 12a):

> It would ordinarily be impossible to make an investigation, have a hearing, and permit the introduction of evidence and cross-examination, with some resultant finding based upon whatever standard of proof might be appropriate * * * meanwhile suspending the trial in question. It is simply impracticable in the situation of the killing of a key witness to reach any well-founded determination about the true course of events in an hour, a day, a week, or even a month. * * * To make such a determination would require a delay in the trial of weeks or even months that would itself ultimately require a mistrial: the jurors' minds would no longer be fresh and, even worse, the reasons for the delay might have become evident to one or more of them.

Judge Oakes also pointed out that the district court "carefully explored and rejected alternatives to a mistrial," and that its decision not to admit the tape recording was based on the danger of prejudice to Dazzo—a danger heightened by the possibility that the jury had already inferred, on the basis of the earlier testimony against Dazzo,

that witnesses were being threatened—and on the "public's interest in ensuring that there was neither a mistrial as to Dazzo nor grounds for a retrial at which witnesses who had testified might not be available or willing to testify [again]" (Pet. App. 13a-14a). The court of appeals accordingly deferred to Judge Weinstein's "judgment about the events occurring before the jury and to his observation of the witnesses, the parties, and the jury itself," and held that he had "acted well within the wide discretion afforded him by the double jeopardy cases" (*id.* at 15a).

Judge Meskill dissented on the ground that the mistrial was "neither for [petitioner's] benefit nor demonstrably caused by [petitioner]" (Pet. App. 20a), and that the district court had a reasonable alternative to declaring a mistrial; in Judge Meskill's view, the district court should have admitted the tape recordings and "either * * * redact[ed] the allegedly threatening portions of the conversation or * * * giv[en] a curative instruction to the jury" (*id.* at 19a).

ARGUMENT

1. It has long been established that a defendant may be retried after a mistrial has been declared due to "manifest necessity"—that is, because "the ends of public justice would * * * be defeated" by continuing the trial. *Arizona* v. *Washington*, 434 U.S. 497, 506 n.18 (1978), quoting *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824). See also *United States* v. *Jorn*, 400 U.S. 470, 485 (1971) (plurality opinion). "Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment." *Gori* v. *United States*, 367 U.S. 364, 368 (1961). Substantial deference is ordinarily to be accorded the trial court's determination that a mistrial is necessary.

Arizona v. *Washington, supra,* 434 U.S. at 510. This case presents a clear example of a retrial permitted by these principles.

This is not a case, for example, in which a mistrial was declared in order to avert an acquittal and give the government an opportunity to gather more evidence. To be sure, the Court has permitted retrials even where the mistrial was the result of the government's error. Compare *Illinois* v. *Somerville,* 410 U.S. 458 (1973), with *Downum* v. *United States,* 372 U.S. 734 (1963). But here there can be no suggestion that the government was responsible for Bennett's being killed. Moreover, contrary to petitioner (*e.g.,* Pet. 10-11), this is not a case in which the mistrial operated "as a post-jeopardy continuance to allow the prosecution an opportunity to strengthen its case" (*Illinois* v. *Somerville, supra,* 410 U.S. at 469); the government made plain its willingness to proceed with the evidence in its possession at the time Bennett was killed, and petitioner identifies no way in which the lapse of time could aid the government. Indeed, the delay can only diminish the willingness of any other witnesses to testify against petitioner.

As Judge Weinstein explained, the purpose of the mistrial in this case was to preserve defendant Dazzo's "valued right to have his trial completed by [the] particular tribunal" before which it began (*Wade* v. *Hunter,* 336 U.S. 684, 689 (1949)). Petitioner himself pointed out to Judge Weinstein that the judge could have admitted the tape recording and then granted Dazzo's almost certain motion for a mistrial; alternatively, had the judge denied Dazzo's motion for a mistrial, on appeal Dazzo could have assigned the admission of the recording as error and possibly had his conviction reversed. But either approach would have subjected Dazzo to precisely the injuries against which the Double Jeopardy Clause is designed to protect—an "increase[d] * * * financial and emotional burden on the accused, [a]

prolong[ed] * * * period in which he is stigmatized by an unresolved accusation of wrongdoing, and [possibly] even [an] enhance[d] * * * risk that an innocent defendant may be convicted" (*Arizona* v. *Washington, supra,* 434 U.S. at 503-504 (footnotes omitted)).

Judge Weinstein's decision to declare a mistrial was, therefore, prompted by a concern for the rights of a defendant (see *Gori* v. *United States, supra*). In his view, one of the defendants had to face a retrial. The government's case against Dazzo was essentially complete, and there was no indication of his complicity in Bennett's killing. In these circumstances, Judge Weinstein's decision to declare a mistrial as to petitioner, instead of admitting evidence he considered unfairly prejudicial to Dazzo, was certainly not "erratic" (*Illinois* v. *Somerville,* 410 U.S. 458, 469 (1973), citing *United States* v. *Jorn, supra*), and in fact was plainly correct. "[W]here the declaration of a mistrial implements a reasonable state policy and aborts a proceeding that at best would have produced a verdict that could have been upset at will by one of the parties, the defendant's interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public justice." *Illinois* v. *Somerville, supra,* 410 U.S. at 471. See *Arizona* v. *Washington, supra,* 434 U.S. at 516. Indeed, Judge Weinstein's decision was based in part on his determination that petitioner himself would be prejudiced if the jury, after being exposed to intimations that witnesses were threatened, heard only a tape recording from a witness whom they expected to testify in person. To this extent, *Gori* v. *United States, supra,* plainly permits petitioner to be retried.

2. Petitioner suggests (Pet. 10), following Judge Meskill, that Judge Weinstein might have redacted the tape recording, or that perhaps the tapes were not so prejudicial as to require exclusion. But there is no indication in the colloquy

following the announcement of Bennett's killing that petitioner suggested to Judge Weinstein that the recording be redacted, and in any event the question whether redaction was possible is one that is peculiarly within the discretion of the district judge, subject at most to limited appellate review.

Similarly, this Court has held that, even when double jeopardy rights are at stake, the trial judge's determination that a jury will be too prejudiced to render a fair verdict is entitled to the greatest deference. *Arizona* v. *Washington, supra,* 434 U.S. at 511-514. As the court of appeals pointed out, Judge Weinstein was in the best position to know the impact on the jury of the previous suggestions that witnesses had been intimidated, the likely impact on the jury of hearing only a tape recording from a witness they expected to see testify, and the likely impact of petitioner's recorded threats and incriminating remarks on Dazzo's defense. Indeed, when Judge Weinstein declared the mistrial, he cited petitioner's vigorous motion for a mistrial earlier in the day—a motion that was a response to a mere suggestion that a witness against Dazzo was threatened. In view of this motion, petitioner is hardly in a position to belittle the impact of evidence like that contained in the recording.

3. Finally, it is of course unthinkable that a defendant should profit from arranging the killing of a witness against him. Even permitting the appearance that a defendant is benefitting from such an act is inconsistent with "the ends of public justice" (*United States* v. *Perez, supra*), and it is at least arguable that preventing such an appearance is itself a sufficiently strong public policy to permit a retrial in a case like this.[4] At the time he declared a mistrial, Judge

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[4]Petitioner appears to assert (Pet. 8-9) that the "distinct possibility" of his complicity in Bennett's killing cannot establish a waiver of his rights under the Double Jeopardy Clause. But this argument rests on the incorrect assumption that a defendant cannot be retried after a

Weinstein had heard tape recordings in which petitioner threatened Bennett,[5] and the judge found other evidence that suggested petitioner's involvement in Bennett's death. Petitioner offers no adequate answer to the court of appeals' conclusion that, given the importance of the public policies involved, some quantum of evidence such as that found by Judge Weinstein must be sufficient to permit the trial court to find a "manifest necessity" for a mistrial; an ongoing criminal prosecution simply cannot be continued pending the completion of a full ancillary criminal investigation, followed by a trial to establish guilt beyond a reasonable doubt.

Petitioner repeatedly complains (Pet. 4, 6, 7, 9, 12-13) that the district court did not hold a hearing on his complicity in Bennett's killing. But petitioner did not request a hearing before the mistrial was declared; thereafter, he specifically refused Judge Weinstein's offer to hold a full evidentiary hearing on the motion to dismiss the indictment. Petitioner could at that time have introduced any evidence that he believed undermined Judge Weinstein's findings. The failure to hold a hearing is, therefore, entirely attributable to petitioner.

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mistrial unless he waives these rights; it has been established since *United States* v. *Perez*, *supra*, that sufficiently strong public policies can justify a retrial after a mistrial is declared over a defendant's objection.

[5]Petitioner does not appear to deny that it was his voice on the recording. While petitioner now asserts (Pet. 3) that his recorded statements were not necessarily threatening, both Judge Weinstein and the court of appeals (see Pet. App. 6a-7a) believed they were.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1982

DOJ-1982-04